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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. _____ MISC.

THE PEOPLE OF THE STATE OF COLORADO,

~~PETITIONER~~-APPELLEE,

IN THE INTEREST OF D. A. K.

MINOR CHILD

~~AND CONCERNING~~ J. K. S.,

~~RESPONDENT~~-APPELLANT

ON APPEAL FROM THE

SUPREME COURT OF THE

STATE OF COLORADO

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Pursuant to United States Supreme Court Rules 12(2) and 15, appellant submits this statement of the basis for jurisdiction of the Supreme Court of the United States on direct appeal from the ruling of the Colorado Supreme Court, affirming the judgment of the District Court of Jefferson County, State of Colorado, and the reasons for exercise of such jurisdiction in this case.

OPINIONS BELOW

The opinions of the Supreme Court of the State of Colorado affirming the judgment of the District Court of Jefferson County, State of Colorado, are reported at 596 P.2d 747 and ____P.2d ____ and attached as Appendix A.

JURISDICTION

This appeal is taken from the final judgment in a proceeding to adjudicate a child dependent and neglected under the Colorado Children's Code, Sections 19-1-101, et seq., and 19-3-101 et seq. Colorado Revised Statutes (C.R.S) 1973, attached as Appendix B.

The decision of the Colorado Supreme Court was rendered on June 4, 1979, and rehearing denied on July 16, 1979. Notice of appeal was filed in the District Court of Jefferson County, State of Colorado, (court possessed of the record) and served upon the Clerk of the Supreme Court of Colorado on October 10, 1979.

The Supreme Court of the United States has jurisdiction to review the ruling of the Colorado Supreme Court by direct appeal pursuant to 28 U.S.C. § 1257(2) in that appellant asserts that a state statute is repugnant to the Constitution of the United States and the Colorado Supreme Court upheld that statute's validity. See, Levy v. Louisiana, 391 U.S. 68 (1968); Mercantile National Bank at Dallas v. Langdeau, 371 U.S.555 (1963); Robinson v. State of Florida, 378 U.S. 153 (1964); Amalgamated Food Employees Union Local 590, et al. v. Logan Valley Plaza, Inc., et al., 391 U.S. 308 (1967); Central R.R. Company of Penn. v. Comm. of Penn., 370 U.S. 607 (1962).

In the event the Court does not consider appeal the proper mode of review appellant requests this jurisdictional statement be acted upon as a petition for certiorari pursuant to 28 U.S.C. § 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a challenge, under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, to the validity of Section 19-1-103(20) C.R.S. 1973, which states:

> "Neglected or dependent child" means a child:
> (a) Whose parent, guardian, or legal custodian has abandoned him or has subjected him to mistreatment or abuse or whose parent, guardian, or legal custodian has suffered or allowed another to mistreat or abuse the child without taking lawful means to stop such mistreatment or abuse and prevent it from recurring;
> (b) Who lacks proper parental care through the actions or omissions of the parent, guardian, or legal custodian;
> (c) Whose environment is injurious to his welfare;
> (d) Whose parent, guardian, or legal custodian fails or refuses to provide proper or necessary subsistence, education, medical care, or any other care necessary for his health, guidance, or well-being; or
> (e) Who is homeless, without proper care, or not domiciled with his parent, guardian, or legal custodian through no fault of his parent, guardian, or legal custodian.

No other definition of dependency or neglect exists in Colorado statutes or case law, nor was any more definite standard provided by either court in this case.

Families found to have dependent or neglected children are subject to encroachment by the state into familial autonomy and integrity which, at its extreme, results in the dissolution of the family by permanently removing the child from the home and legally severing parental rights. Sections 19-1-104(c), 19-3-101(2), 19-3-106 and 19-3-111, C.R.S. 1973.

QUESTION PRESENTED

Whether Colorado's dependency and neglect definitional statute, Section 19-1-103(20) C.R.S. 1973, offends the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that it is so vague that it fails to provide adequate notice of its meaning and the scope of its application and so overbroad that it threatens to inhibit the exercise of fundamental rights of parents and to allow undue interference by the state into the integrity of the family?

STATEMENT OF THE CASE

The proceedings from which this appeal arises began with a neglect and dependency petition brought "in the interest of D.A.K., minor child." The petition was brought in the District Court of Jefferson County, State of Colorado, by the Jefferson County Department of Social Services and named J.K.S., the child's mother, as respondent.

The petition was filed on February 27, 1975 and alleged that "the parent . . . has subjected the child herein to mistreatment or abuse" . . . and that the child "lacks proper parental care through the actions or omissions of the parent" . . . and that the "parent . . . fails or refuses to provide proper or necessary subsistence, education, medical care or any other care necessary for his health, guidance or well-being." These vague allegations were directly quoted from Section 19-1-103(20) C.R.S. 1973.

By preliminary motions, the various grounds for neglect and dependency raised by petitioner were reduced to those consisting solely of "emotional abuse":

> In this case no physical abuse of the child was alleged or proved. Rather the petition and bill of particulars set forth specific allegations of emotional abuse . . . .

In the Interest of D.A.K., Supreme Court of Colorado, No. 28363 (June 4, 1979), Appendix A., at A-5.

Respondent moved the trial court to dismiss the petition on grounds that Section 19-1-103(20) C.R.S. 1973 was vague and overbroad on its face and as applied in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The court denied the motion to dismiss, specifically ruling that Section 19-1-103(20) C.R.S. 1973 was constitutional.

At trial respondent J.K.S. requested and proposed an instruction defining emotional abuse with particularity. See, Proposed Instruction attached as Appendix C. The trial court denied the proposed instruction, perhaps because no definition of emotional abuse is provided by statute. Indeed, the Colorado neglect and dependency statute, Sections 19-1-101 et seq. and 19-3-101 et seq., C.R.S. 1973, nowhere mentions emotional abuse.

After trial, on October 28, 1976, the jury found D.A.K. to be a dependent and neglected child. Following a dispositional hearing on November 8 and 9, 1977, the court issued a Dispositional Order, on January 3, 1978, terminating appellant's parental rights. Appellant moved for a new trial, raising the statute's unconstitutional vagueness and overbreadth as grounds. This motion was denied on April 6, 1978.

Appellant filed Notice of Appeal to the Colorado Court of Appeals on May 2, 1978. Because the constitutionality of a state statute was questioned, the case was transferred to the Colorado Supreme Court on September 11, 1978.

The Supreme Court accepted jurisdiction and oral arguments were heard on December 12, 1978. On June 4, 1979, the Supreme Court of the State of Colorado issued its ruling affirming the judgment of the District Court. The court specifically ruled that Section 19-1-103(20) C.R.S. 1973 was not unconstitutionally vague or overbroad.

> [R]espondent next argues that Section 19-1-103(20)(a) . . . is so vague and uncertain that it fails to meet the constitutional requirements for statutory definiteness . . . . We do not agree . . . . While acknowledging that the possible consequences of adjudicating a child to be neglected or dependent can be grave, we hold that the statute gives the parents sufficient notice of the kinds of conduct which could result in their losing parental rights.

In the Interest of D.A.K., Supreme Court of Colorado, No. 28363 (June 4, 1979), Appendix A, at A-5.

Appellant petitioned for rehearing on July 2, 1979, specifically raising the issues of vagueness and overbreadth. The Supreme Court of Colorado denied the Petition for Rehearing on July 16, 1979, without addressing the issues of vagueness and overbreadth, and again upholding the statute See, In the Interest of D.A.K., Supreme Court of Colorado, No. 28363 (July 16, 1979), Appendix A., at A-16.

THE QUESTION PRESENTED IS SUBSTANTIAL

As construed by Colorado's highest court, the Colorado neglect and dependency statutes, and specifically Section 19-1-103(20) C.R.S. 1973, allow a court to remove a child from its parent or guardian and terminate the parent-child relationship based on emotional abuse. The appellant mother in this case recognizes that emotional abuse can be as damaging to a child as physical abuse and acknowledges the state's interest in protecting children from such abuse. However, emotional abuse by its nature is a complex subject which demands inquiry into a family's most intimate beliefs, mores, standards and culture. Only the most specific statutes and standards should govern when and what state interference is appropriate.

Acceptable statutes have been drafted in other states. However, Colorado's statute does not meet applicable constitutional standards and, as the result in this case shows, the protection of fundamental rights is delegated to welfare workers, judges and juries for resolution on a standardless, ad hoc basis. The failure of the statutory language to include or define emotional abuse as grounds for finding a child neglected and dependent and, ultimately, to terminate the parent-child relationship violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because of vagueness and overbreadth.

Caretakers of children across the United States are subject to the sanctions available under dependency and neglect statutes. More particularly, the mother here, J.K.S., had her parental rights terminated by the State of Colorado because her child, D.A.K., was found to be dependent and neglected as a result of "emotional abuse" from his mother, even though, at trial, no resulting harm was shown and none was required to be found under the statute or by the courts.

The problems of abused children have become a matter of intense public interest and debate in recent years. Child abuse is now recognized to be more widespread than previously thought, and to cut across lines of race, economic status and culture. The "battered child syndrome" is now believed to be the cause of many serious problems among adults, including criminal behavior, emotional illness and abuse of the victim's own children.

As a result of this fast-growing interest (often resulting from public outcry following notorious local cases of physical abuse), welfare agencies, police departments and courts have understandably become much more willing to remove children from their families. State authorities now inquire into and interfere with the parent-child relationship to an unprecedented degree.

Much of this attention is long overdue, but the potential dangers are obvious. Now, as state authorities expand their interest into the area of emotional abuse, fundamental constitutionally protected aspects of the parent-child relationship are threatened. Without the guidance of clear statutory standards, overreaction in the face of intense public pressure has begun to stimulate a degree of interference with family life that could cause more serious, lasting harm to children than that sought to be avoided.

The mother in this case, who has now been without her child for over three years due to her "conduct" constituting "emotional abuse" absent a clear showing of resulting harm to her child, asks this Court to examine the statutory standards governing state interference in response to such behavior.

A. A parent's right to the companionship, care, custody and management of her child is a fundamental right protected by the due process clause of the Fourteenth Amendment of the United States Constitution.

Deeply rooted in the traditions and conscience of the American people are those liberties that are so important as to be ranked as fundamental and deserving of protection through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Palko v. Connecticut, 302 U.S. 319, 325 (1937). See also, Griswold v. Connecticut, 381 U.S. 479, 481-485 (1965); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974). A parent's companionship and management of children is such a liberty.

This Court has frequently emphasized the importance of the parent's right to the companionship, care, custody and management of their children. This right has been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399 (1923); and recognized as "one of the basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); and "far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533 (1953).[1/] This right cannot be unreasonably or impermissibly interfered with by the State.

[1/] Courts throughout the country have recognized the importance of the family relationship: "There is no satisfactory substitute for a mother's love . . . ." Washburn v. Washburn, 49 Cal.App.2d 581,588, 12 P.2d 96, 100, (1942); "A dominant parental right to custody of the child pervades our law," In Re Raya, 255 Cal.App.2d 260, 63 Cal.Rep. 252 (1967); "the presumption in all cases is that the child's parents will love it most and care for it best," Moody v. Moody, 211 So. 2d 842 (Miss. 1968); "We are not unmindful of the fact that a father . . . should be given society's assistance at every point in his effort to re-establish a proper home for the children for whose care he has the right and duty to provide," Harmsen v. Fizzell, 351 Mich. 86, 110 (1957). See, Allen v. Huffman, 307 P.2d 802 (Colo.1957); Devlin v. Huffman, 339 P.2d 1008 (Colo. 1959).

In Stanley v. Illinois, 405 U.S. 645, 651 (1972), the Court stated:

> It is plain that the interest of a parent in the companionship, care, custody and management of his or her children come[s] to this court with a momentum of respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. (Citation omitted).

The Colorado Supreme Court explicitly acknowledged the fundamental protected right of parents by its own opinion in In the Interest of D.A.K.:

> [T]he parent has much at stake in the outcome of the proceeding. Once the child is adjudicated to be neglected or dependent the court may take various actions including entry of a decree terminating the legal relationship of parent and child. Section 19-3-111(2). Thus, although no criminal sanction is involved, a serious and substantial parental interest is at stake, which in many, if not most, cases is as important to the parents as their freedom.

In the Interest of D.A.K., Supreme Court of Colorado, No. 28363 (June 4, 1979), Appendix A, at A-4.

Similarly, a child has a fundamental, substantial interest in the outcome of neglect and dependency proceeding since "it is generally assumed that separation carries substantial risks for the child . . ." Mnookin, "Foster Care -- In Whose Best Interests?", 43 Harv. Ed. Rev. 624 (Nov. 1973). See, Goldstein, Freud, and Solnit, Beyond the Best Interests of the Child (1973).

Thus, for both the parents and the child, the rights of familial companionship and parental custody and control have been recognized a fundamental constitutionally protected interest.

B. The constitutional doctrines of vagueness and overbreadth apply to neglect and dependency statutes which affect and may deprive parents of their fundamental right to the companionship, care, custody and management of their children.

The void-for-vagueness and overbreadth doctrines apply to civil statutes. In A. B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233 (1925), this Court held:

> The ground or principle of the [vagueness] decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.

Supra, 239. See also, Jordan v. DeGeorge, 341 U.S. 223, 231 (1951).

Moreover, the strict standards of statutory definiteness and scope required of penal statutes and statutes potentially infringing on constitutional rights should apply to dependency and neglect statutes.

When considering the constitutional rights of parties in juvenile proceedings, substance cannot be disregarded "because of the feeble enticement of the 'civil' label of convenience attached to juvenile proceedings." In Re Gault, 387 U.S. 1, 50 (1967). Several fundamental aspects of neglect cases indicate that the "civil" label attached to neglect statutes conceals the seriousness of neglect adjudications.

In a neglect proceeding the state asserts its weight and immense resources on behalf of the public against the parent. Although in theory the state acts to protect the child, the parent is summoned to answer the full force of the state's contention that the parent has engaged in some misconduct. As such, the state's function in a neglect case approaches more closely the state's traditional role in criminal rather than civil proceedings.

A neglect adjudication imposes harsh consequences upon both the parent and child.

> A neglect or dependency proceeding is not intended to punish the parent for conduct involving the child. However, we recognize that the parent has much at stake in the outcome of the proceeding. Once the child is adjudicated to be neglected or dependent the court may take various actions including entry of a decree terminating the legal relationship of parent and child. Section 19-3-111(2). Thus, although no criminal sanction is involved, a serious and substantial parental interest is at stake, which in many, if not most, cases is as important to the parents as their freedom.

In the Interest of D.A.K., Supreme Court of Colorado, No. 28363 (June 4, 1979), Appendix A, at A-8.

Parental conduct for which a child may be declared neglected may also constitute grounds for criminal prosecution against the parent for contributing to the neglect or delinquency of a child or for child abuse. In essence, parents in neglect cases are alleged to have engaged in conduct which may constitute a crime. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

Although courts ritually recite their intentions to act in the child's best interest, neglect adjudications typically reflect court disapproval of parental conduct rather than any consideration of whether the child will be endangered by allowing him to remain in parental custody. Sullivan, "Child Neglect: The Environmental Aspects," 29 Ohio St. L. J. 92 (1968). This becomes poignantly clear in the instant case where the Colorado Supreme Court narrowly focuses upon the conduct of the respondent mother, J.K.S., in dismissing the constitutional challenge for vagueness:

> Fundamental fairness does not require a statute to enumerate in all-encompassing examples, or exactly described acts, precisely how poorly a parent can treat a child before risking loss of parental rights. [Citation omitted] Our legal system occasionally requires courts to draw lines. In any event, the conduct [of] J.K.S. here involved would clearly qualify as emotional abuse even if such parameters more accurately defining emotional abuse were required. [Emphasis added]

In the Interest of D.A.K., Supreme Court of Colorado, No. 28363 (June 4, 1979), Appendix A, at A-8.

"Taken together, the aforementioned features of neglect proceedings present a picture hardly distinguishable from criminal prosecution." Comment, "Child Neglect-Due Process for the Parent," 70 Col. L. Rev. 479 (1970).

Furthermore, constitutional restrictions on statutory vagueness and overbreadth are applied strictly when fundamental rights, especially First Amendment rights, are implicated. N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Gooding v. Wilson, 405 U.S. 518 (1972). This strict application of the vagueness and overbreadth doctrines extends to "penumbral" First Amendment rights. Edwards v. California, 314 U.S. 160 (1941) (right to travel); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (right to travel); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) (right to free and private association). The right to private familial association is such a fundamental "penumbral" First Amendment right. Griswold v. Connecticut, 381 U.S. 479 (1965); Wisconsin v. Yoder, 406 U.S. 205 (1972); Roe v. Wade, 410 U.S. 113 (1973); Moore v. City of East Cleveland, ___U.S.___, 97 S.Ct. 1932 (1977)

For these reasons, neglect statutes should be tested by the same standards of definiteness required of criminal statutes and statutes implicating fundamental rights. Only then will parents be afforded the fundamental fairness which due process guarantees them.

C. The increasingly intrusive and extensive regulation of parental conduct by the states without legislatively fixed standards should be subjected to constitutional restraint.

With the advent of the medical diagnosis of "battered-child syndrome" in 1962, the public has become increasingly concerned to protect children from abusive and neglectful parents.[2/] See, Newberger and Boume, "The Medicalization and Legalization of Child Abuse," 48(4) Amer. J. Orthopychiatry, 593-607 (Oct. 1978). Responding to this public interest, legislatures enacted statutes to protect dependent and neglected children and defined "abuse" in terms of "mistreatment" or "parental cruelty." See, Law and Tactics in Juvenile Cases, 2nd Ed., National Juvenile Law Center, §§ 16.6 and 16.8.

Early court decisions concerning child abuse have focused upon cause and effect. The cause was some act or omission by the parent and the effect was physical harm to the child resulting in sudden death or "where the degree and type of injury is at variance with the history given regarding the occurrence of the trauma." Kempe, Silverman, Droegemueller, and Silver, "The Battered-Child Syndrome", 181 J. of Amer. Med. Assoc. 17 (July 7, 1962). See, In re Young, 270 N.Y.S. 2d 250 (Fam. Ct. 1966); In re People in the Interest of R.K., 505 P.2d 37 (Colo.App. 1972); In re People in the Interest of K.S., 515 P.2d 130 (Colo.App. 1973).

Courts and legislatures have more recently realized "that the emotional well-being of children is more important than their physical health." Katz, When Parents Fail (Beacon Press, 1971). Responding to the relatively new concept of emotional maltreatment, states began enacting or amending their children codes to include actions detrimental to the mental health of a child as ground for termination of parental rights. Some states have carefully defined "emotional abuse". See, e.g., Idaho Code § 16-1625 (1971) (condition of a child who has been denied proper parental love, or adequate affectionate parental association, and who behaves unnaturally and unrealistically in relation to normal situations, objects and other persons).[3/]

In the absence of statutory guidance, however, court actions based on emotional abuse have resulted in injustice. The psychological neglect category has been used to terminate parental rights in the situation where a child was in the home with other illegitimate children, In re Cooper, 248 A.2d 384 (Md.App. 1968); and where a mother was writing bad checks, In re Welfare of Karen, 159 N.W. 2d 402 (Minn. 1968). In Roe v. Conn , 417 F.Supp. 769 (M.D.Ala. 1976), an Alabama juvenile court used the justification of protecting a child's "health" -- presumably emotional health since no physical harm was shown -- to justify the removal of a white child from its mother because they were living in a black neighborhood. The district court in Roe v. Conn went on to declare the

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2/Kempe, Silverman, Steele, Droegemueller, and Silver, "The Battered-Child Syndrome," 181 J. of Amer. Med. Assoc. 17 - 24 (July 7, 1962). Although courts, under the doctrine of parens patriae, had long imposed sanctions upon parents who had unreasonably physically abused their children, the medical profession and other fields had not recognized the phenomenon of child abuse as a disease or a clinical diagnosis. The work and study by Dr. Kempe and others resulted in the identification of clinical manifestations of physically abused children described as the "battered-child syndrome." The recognition of physical child abuse by the medical profession as a condition which could be diagnosed has significantly heightened the public's awareness of the

3/According to the National Center for Child Abuse in Washington, D.C., more than 45 states refer to emotional maltreatment, using different terms for this form of child abuse or neglect.

Alabama statutes applied in that case unconstitutionally vague.

Increasing recent awareness of child abuse has been accompanied by violations of fundamental rights when the standards for dependency and neglect are vague or of sweeping application. Such violations create a need for delineating the constitutional requirements for valid dependency and neglect statutes.

D. The Colorado Statutes for neglected and dependent children are constitutionally deficient due to unclear and ambiguous language and due to the absence of any clear ascertainable standards with which to measure any parental conduct or practice.

The Due Process Clause of the Fourteenth Amendment requires statutes to meet three basic requirements of definiteness and scope: (1) the statute's language must be sufficiently specific so that a person of ordinary intelligence need not guess at its meaning; (2) the statute must contain standards by which it may be applied in a non-discriminatory fashion; and (3) the statute must not sweep so broadly that it proscribes or inhibits constitutionally protected interests. Grayned v. City of Rockford, 408 U.S. 104 (1971). See, Connally v. General Construction Company, 269 U.S. 385 (1926); United States v. L. Cohen Grocery, 255 U.S. 81 (1921).

If the statute fails to give a person of ordinary intelligence fair notice of the illegality of his contemplated act, it is unconstitutional. Wright v. Georgia, 373 U.S. 284 (1963); Bouie v. Columbia, 378 U.S. 347 (1964); Scull v. Virginia, 359 U.S. 344 (1959); United States v. National Dairy Products, 372 U.S. 29 (1963) reh. den., 372 U.S. 961 (1963).

Thus, in Giaccio v. Pennsylvania, 382 U.S. 399, 404 (1965), the Court held:

> It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as 'misconduct' or 'reprehensible misconduct'.

Similarly, in Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10, 18 (S.D.Iowa 1975) aff'd. 545 F.2d 1137 (8th Cir. 1976) the court held an Iowa parental rights termination statute unconstitutionally vague, stating that:

> The standards of 'necessary parental care and protection', . . . and of '[parental] conduct detrimental to the physical or mental health or morals of the child', . . . are susceptible to multifarious interpretations which prevent the ordinary person from knowing what is and is not prohibited. An examination of these phrases will not inform an ordinary person as to what conduct is required or must be avoided in order to prevent parental termination.

By the same reasoning, Section 19-1-103(20) C.R.S. 1973 as amended does not provide adequate warning of what conduct is proscribed or mandated.

The Colorado statute also fails to provide standards to guide social workers, judges, and juries in determining what conduct or condition is, or is not, dependency or neglect. The vagueness of the Colorado neglect statute thus permits social workers, courts and juries to make highly subjective determinations on the appropriate application of the statute to specific families. The great discretion thus given administrative agencies and the judiciary frequently results in, as this Court has recognized, "class based intrusion[s] into the family life of the poor," because of "a bias that . . . the natural parents' poverty and lifestyle [are] prejudicial to the best interests of the child." Smith v. Organ. of Foster Families for E. and Reform, ___ U.S.__, 97 S.Ct. 2094, 2104 - 2105 (1977) (citations omitted). See also, Papachristou v. Jacksonville, 405

U.S. 156 (1972); Amsterdam "The Void-for-Vagueness Doctrine in the Supreme Court," 109 U.Pa. L. Rev. 67 (1960).

Finally, the Colorado dependency and neglect statute infringes upon constitutionally protected conduct. The scope of parental rights is nowhere exhaustively defined. However, at a minimum, they include the right to the care, custody, and control of the child, the right to discipline the child, and the right to control the child's religious and moral education. The manner and method of exercising these parental rights and responsibilities varies from "permissiveness" to "strict disciplinarianism."

In this case the Colorado statute resulted in an accusation, jury instructions, and findings of neglect and dependency based solely upon emotional abuse without any definition or standard for that term and without any evidence, inquiry, or apparent concern for actual emotional harm to the child D.A.K. Such broad authorization for intervention in individual lives is not constitutionally permissible.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1979

Number 79-5507

THE PEOPLE OF THE STATE OF COLORADO,
PETITIONER/APPELLEE

IN THE INTEREST OF D. A. K.,
A CHILD

AND CONCERNING J. K. S.,
RESPONDENT/APPELLANT

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

Number 79-5507

THE PEOPLE OF THE STATE OF COLORADO,
PETITIONER/APPELLEE

IN THE INTEREST OF D. A. K.,
A CHILD

AND CONCERNING J. K. S.,
RESPONDENT/APPELLANT

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION OF APPELLEE TO DISMISS OR AFFIRM

The Appellee, pursuant to Supreme Court Rules 16(1)(b), 16(1)(c), and 53(4) respectfully moves this honorable Court to dismiss the appeal filed herein, or, alternatively, to affirm the judgment of the Supreme Court of Colorado on the following grounds:

1. That no substantial federal question is presented;
2. That there exists adequate state grounds for the decision; and
3. That it is manifest that the questions on which the decision of this appeal depends are so unsubstantial as not to require further argument.

OPINION BELOW

A memorandum opinion of the Supreme Court of Colorado (the same being reported at 596 P.2d 747) is attached hereto as Appendix A.

JURISDICTION

The Appellee does not contest jurisdiction based upon the premise that the highest state court has upheld a state statute against a claim of unconstitutionality.

QUESTION PRESENTED

Whether or not 19-1-103(20)(a), Colorado Revised Statutes of 1973 as amended, which defines a neglected or dependent child as one who has been subjected to "mistreatment" or "abuse" is violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution because of vagueness if that statute can be read to include emotional abuse as a grounds for an adjudication of dependency or neglect?

STATEMENT OF FACTS

For purposes of this Motion only, the Appellee will accept as generally accurate the Statement of the Case found in the Appellant's Jurisdictional Statement at pp. 4 - 6 thereof.

ARGUMENT

The decisions of this Court and several other federal courts clearly establish that the right of parents to the care, custody and control of their minor children is, although substantial, not unlimited, and that the protection of the moral, emotional, mental and physical welfare of minors is acknowledged to be a legitimate area of state concern well within its legislative powers. See Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Bykofsky v. Burough of Middletown, 401 F. Supp. 1242 (D.C. Pa. 1975), affirmed 535 F.2d 1245 (3d Cir. 1976), cert. denied 429 U.S. 964, 97 S.Ct. 394, 50 L.Ed.2d 333 (1977); and Newton v. Burgin, 363 F. Supp. 782 (D.C.N.C. 1973), affirmed 414 U.S. 1139, 94 S.Ct. 889, 39 L.Ed.2d 96 (1974). Title 19 of the Colorado Revised Statutes (hereinafter referred by section as C.R.S.) is precisely designed to affect these legitimate ends.

In enacting this law (commonly referred to as the "Childrens' Code") the General Assembly of Colorado not only defined a neglected or dependent child as one who had been mistreated or abused, it also provided that a judicial determination of the existence of these conditions and the most appropriate remedy therefor are to be the result of a system providing for bifurcated hearings. See 19-1-103(20)(a), 19-3-106, and 19-3-109, C.R.S. The first of these hearings (the "adjudicatory") is concerned solely with the existence or nonexistence of abuse, and only in the latter ("dispositional") is any consideration given to the possibility of terminating parental rights as a dispositional alternative. See People in the Interest of M. B., 188 Colo. 370, 535 P.2d 192 (1975); and Johnson v. People in the Interest of W. J., 170 Colo. 137, 459 P.2d 579 (1969).

The Appellant's child was adjudicated dependent or neglected after a three day trial to a jury and her parental rights were terminated after a subsequent two day dispositional hearing to the court. However, the appeal which followed concerned itself only with the adjudication and not the disposition (see the issues raised on appeal copied from the Appellant's Brief in the Court below and attached as Appendix B). Presumeably, this was based upon the Appellant's theory that if the adjudication were to be reversed, the disposition would dissolve of its own accord.

This point is made to emphasize the fact that although

the Appellant makes much of the importance and fundamentality of her parental rights, the only issues before the Supreme Court of Colorado on appeal had not to do with terminating those rights, but were relative only to the adjudicatory trial at which the sole issue was whether or not the subject child was dependent or neglected by virtue of being mistreated or abused. Thus it is that the question of the vagueness of the subject statute must be considered with reference only to that proposition. And thus it also is that the Appellant's reliance on Alsager v. District of Polk County, Iowa, 406 F. Supp. 10 (S.D. Ia. 1975), affirmed 545 F.2d 1137 (8th Cir. 1976) is misplaced. It is clearly stated in footnote 3 at p. 16 thereof that:

> "The court is only concerned with the parents' right in a termination context vis-a-vis the state . . . thus the court's ruling today does not prevent the state from temporarily separating the child from its parents upon an adjudication of neglect or dependency . . . the court's ruling goes only to state action which permanently destroys the family unit, not to a temporary physical separation for the protection of the child." (Emphasis added)

Hence Alsager dealt with the applicability of a statute alleged to be vague in the context of a dispositional proceeding. Herein the adjudicatory trial and that only has been appealed, and the sole issue therein was as stated above. Although parental rights may be terminated if the child is found to be neglected, that determination is made at a subsequent proceeding. The Appellant cannot have both sides of the street. She cannot appeal from the adjudicatory trial and then complain that the termination of the parent-child relationship has such an affect upon "fundamental rights" that the high standards of strictly construed criminal statutes were not adhered to when those rights were not the subject of the proceeding. Nor can she in appealing the one and excluding all reference to the other, overlook this distinction at her convenience and state that,

really though, they are part and parcel of the same transaction when 19-3-106, 19-3-109 and such decisions of the Colorado Supreme Court as People in the Interest of M. B., supra, and Johnson, supra, declare that difference between the two.

In its decision per Justice Jim R. Carrigan (unanimous except for Justice William H. Erickson who did not participate), the Supreme Court affirmed the lower court rejecting each of the Appellant's contentions and declining to accept her analogies and comparisons to criminal law. Repeating its statement from Robinson v. People, 173 Colo. 113, 476 P.2d 262 (1970), it found that "A proceeding to determine whether a child is dependent or neglected is civil in nature". (See Opinion, p.7) While it recognized the substantial rights of parents in such cases throughout, it also recognized that which the Appellant seemingly fails to see. That is that other substantial rights are involved as well, i.e.:

> "The proceeding does not involve the state against the child's parents. Rather, three parties are affected: the child, the parents, and the state. The state is in the position of parens patriae and the matter for determination is what will best serve the interests of the child."

This wording is, essentially, a quote from the decision of the Supreme Court of Oregon in the case of State v. McMaster, 254 Ore. 291, 486 P.2d 567 (1971) wherein similar issues were raised. Since that decision is cited with approval, it is submitted that some additional language therefrom reflects the unfailing logic which lies at the heart of the Colorado Court's decision:

> "That the welfare of the child is the primary purpose does not lead to the conclusion that the rights of the parents are without constitutional protections . . . This emphasis upon the welfare of the child does imply however, that unlike criminal statutes in which the interests of only one set of individuals is involved, the constitutional issue must be examined with the interest of both the child and the

parents. What might be unconstitutional only if the parents' rights were involved is constitutional if the statute adopts legitimate and necessary means to protect the childs interests." (Emphasis added)

In addressing the issue of the vagueness of 19-1-103, the Court declared that "An ordinarily reasonable parent can understand what it means to 'abuse' and 'mistreat' a child." (Opinion, p. 8) Then, quoting McMaster, supra, and citing the United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1946) it found that:

> "Fundamental fairness does not require a statute to enumerate in all-encompassing examples, or exactly described acts, precisely how poorly a parent can treat a child before risking loss of parental rights . . . Our legal system occasionally requires courts to draw lines . . . Furthermore, the statute is as explicit as could be in order to accomplish the purposes intended . . . The protection of an abused or mistreated child is an area of legitimate legislative concern which does not lend itself to more precise definition. The legislature would find it extremely difficult, if not impossible, to write a statute more specific to accomplish the purposes of protecting a child's safety and welfare while still allowing the juvenile court reasonable flexibility in determining the best interests of the child and society in each case." (Emphasis added)
> (See Opinion, pp. 8 - 9)

The Appellant would now have this Court find fault with the foregoing reasoning and reverse on the apparent theory that in order to protect the rights of the parents, to satisfy the requirements of fundamental fairness to them, to afford due process to them and to avoid being void for vagueness, a child abuse statute must specifically define every conceiveable form of abuse. It is respectfully submitted that the Appellant's argument, which stresses the profoundness of parental rights and ignores the valid purposes of the statute amounts to a naked assertion that their rights are greater than the right of the child to protection and the right of the state to protect him. This it does while ignoring the fact that the decision appealed from was concerned only with the issue of whether or not the

the child in question was abused, and that the subject of the possible termination of parental rights was, as emphasized above, considered in a subsequent hearing which was not appealed from.

The Colorado Court was correct in determining that the requirement of inordinate specificity and exactitude would render the drafting of legislation in this critical area of state concern virtually impossible. In reaching this decision it simply utilized and reiterated principles relative to due process and legislative vagueness previously enunciated by this Court and many others. For instance, it is clearly established that the Constitution does not demand of legislatures scientifically certain criteria of legislation, impossible standards or unattainable feats of clarity. Ginsberg v. State of New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 887 (1968); United States v. Petrillo, supra, Bykofsky, supra; United States v. Maude, 481 F.2d 1062, 156 U.S. App. D.C. 370 (C.A.D.C. 1973); and McMaster, supra. Nor does vagueness invalidate a statute merely because the reviewing court believes that it could have been drafted with greater precision; because it fails to provide for every possible contingency; because it is difficult to determine whether marginal conduct falls within its scope; because it may be more detailed in its provisions; or because ordinary terms are used to express ideas which find adequate interpretation in common usage and understanding. See respectively, Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975); Kister v. Ohio Board of Regents, 365 F. Supp. 27 (D.C. Ohio 1973), affirmed 414 S.Ct. 1117, 94 S.Ct. 855, 38 L.Ed.2d 747; Halleck v. Berliner, 427 F. Supp. 1225 (D.C.D.C. 1977); Whitfield v. Simpson, 312 F. Supp. 889 (D.C. Ill. 1970); Dixon v. Pennsylvania Crime Commission, 347 F. Supp. 138 (D.C. Pa. 1972); and Horn v. Burns and Roe, 536 F.2d 251 (8 Cir. 1976).

If due process requires less literal exatitude in a

statute lacking criminal sanctions as indicated in Horn, supra, and Insurers' Action Council v. Heaton, 423 F. Supp. 921 (D.C. Minn. 1973), then the principles stated above deriving from criminal cases should apply with increased force herein. If this Court can find as it did in Rose, supra, that the term "crime against nature" in a criminal statute is not impermissibly vague, then it is not surprising that cases may readily be found wherein terms such as the following have withstood challenges of being void for vagueness: "incorrigible" in a statute authorizing the suspension of a student from school; "gross disobedience or misconduct" in the statute permitting the expulsion of students from school; "incompetent to drive a motor vehicle" in a licensing statute; "injure himself or other person" in an involuntary mental health commitment statute; and "misconduct in office" in a statute providing for the removal of a public official from office. See respectively: Pervis v. LaMarque, Ind. School District, 466 F.2d 1054 (5th Cir. Tex. 1972); Whitfield v. Simpson, supra; Smith v. McGriff, 434 F. Supp. 674 (D.C. Ala. 1976); In Re Alexander, 336 F. Supp. 1305 (D.C.D.C. 1972); and Clark v. Weeks, 414 F. Supp. 703 (D.C. Ill. 1976). If all of these terms are not so vague as to offend the oft-stated rule that the language of a law must not be so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, how then is the term "abuse" so different?

It cannot be denied that the challenged statute has a rational relation to a legitimate and constitutionally permissible objective and, such being the case, it cannot be judged vague in a vacuum without consideration of the stated legislative purposes, its overall thrust and the judicial interpretations which have refined its meaning. See Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830; United States v. Jefferies, 45 F.R.D. 110 (D.C.D.C. 1968); Clark v. Weeks, supra. If Title 19 is so examined in its totality and its various sections are considered in context, it can be seen that a genuine and effective effort has been made to insure that the rights of all persons involved in dependency or neglect cases are protected.

In 19-1-102, C.R.S., the General Assembly declared its purposes in enacting the Childrens Code to be:

> "1(a) To secure for each child subject to these provisions such care and guidance, preferably in his own home, as will best serve his welfare and the interests of society;
>
> (b) To preserve and strengthen family ties whenever possible, including improvement of home environment;
>
> (c) To remove a child from the custody of parents only when his welfare and safety or the protection of the public would otherwise be endangered;
>
> (d) To secure for any child removed from the custody of his parents the necessary care, guidance and discipline to assist him in becoming a responsible and productive member of society.
>
> (2) To carry out these purposes the provisions of this title shall be liberally construed." (Emphasis added)

Thereafter, it not only provided for the two tiered system of hearings referred to above, it also established such safeguards as: the requirement that both the summons and the petition shall include a statement that the termination of parental rights is a possibility (19-3-102, 19-3-103); trial by jury at the adjudicatory phase if demanded (19-1-106(4)(a)); discovery pursuant to the Rules of Juvenile Procedures or the Rules of Civil Procecures if the former do not apply (19-1-107, Rule 1, Rules of Juvenile Procedure); representation of the parents by counsel (19-1-106(1)); and representation of the child by a guardian ad litem (19-3-105). All of these things occured during the adjudication appealed from.

In addition to the foregoing, the Supreme Court of Colorado, in interpreting Title 19, has specifically declared that dependency or neglect cases must afford the fundamental fairness required by the Fourteenth Amendment; that parents are presumed to be fit and proper persons to have the care and custody of

their children until overcome by convincing evidence to the contrary; that the interest and welfare of the child control; and that although termination of parental rights is a possibility in every dependency or neglect action, it is by no means mandatory. See Robinson v. People, supra, Devlin v. Huffman, 139 Colo. 417, 339 P.2d 1008 (1959); Fulton v. Martensen, 129 Colo. 125, 267 P.2d 658 (1954); and In Re People in the Interest of M. M., 184 Colo. 298, 520 P.2d 128 (1974). It cannot be said, therefore, that no procedural or judicial standards exists in Colorado concerning cases of this type.

It appears that the argument of the Appellant would reject all of the foregoing as inconsequential and demand instead a legislative listing of all the various forms and manifestations of abuse before the subject statute can be considered valid. And yet in the Jurisdictional Statement filed herein (at p. 6), it is plainly stated that "The Appellant mother in this case recognizes that emotional abuse can be as damaging to a child as physical abuse and acknowledges the state's interest in protecting children from such abuse." (Emphasis added). If she herself recognizes that "abuse" may take the form of "emotional abuse" which her son was found to be a victim of, how can she at the same time claim in good faith that the statute failed to provide her with adequate notice of proscribed activity? The logic of her position seems to be something to the effect that "I knew what was meant but, because I was not informed in exact terms of that which I admittedly recognize, I was not given fair notice and, therefore, the decision below should be reversed."

The Appellant would also urge reversal because (as stated in pp. 7 - 8 of the Jurisdictional Statement) unidentified "Acceptable statutes have been drafted in other states"; because "Caretakers of children across the United States are subject to the sanctions available under dependency and neglect statutes"; because "The problems of abused children have become a matter of increased public interest and debate in recent years"; and because

unidentified "State authorities now inquire into and interfere with the parent-child relationship to an unprecedented degree".

Both of these approaches fly in the face of at least two well established rules of law. One is that a statute must be considered in light of its application under the facts of the particular case involved. See Berry v. City of Portsmouth, 562 F.2d 307 (4th Cir. Va. 1977). Another is that one attacking a statute must show that it lacks specificity with regard to his actual conduct or behavior and not with regard to some hypothetical situation or with respect to the conduct of other parties who might not be forewarned by the statute's alleged vague language. In this regard see United States v. Powell, 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975); Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974); United States v. Truedell, 563 F.2d 889 (8th Cir. N.D. 1977); di Leo v. Greenfield, 541 F.2d 949 (2d Cir. Conn. 1976).

In reading the state court's opinion and then the Appellant's Jurisdictional Statement, it becomes clear that the asserted reasons for this appeal are unsubstantial and that the opinion rests both upon principles established by this Court (and decisions of other courts affirmed by this Court) sufficient to foreclose the issue, and upon adequate state grounds as well. Hence, the asserted federal question lacks substantiality, is without merit and leaves no room for real controversy. See Rose v. Locke, supra, Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975); Crawford v. Missouri, 409 U.S. 811, 93 S.Ct. 174, 34 L.Ed.2d 66 (1972); and California Water Service Co. v. Redding, 304 U.S. 252, 58 S.Ct. 865 (1938), 82 L.Ed.2d 1323.

A fair trial was held and the jury reached its decision. The highest court in the state found that it could have reached the decision it did from the evidence presented, that the trial court committed no error and that the statute in question was as precise as the legislature could reasonably draw it given the nature of its purpose. The Appellant, in pursuing this appeal

while acknowledging the existence of the type of abuse found to exist by the jury and acknowledging the state's right to prevent it, is merely seeking a technical and arbitrary reversal based in large measure upon the hypothetical injury to all the state's parents as a class. She is thus, in effect, merely asking this court to second guess both the trial court and the Colorado Supreme Court as to the validity of this law and its application.

It should be noted that the child whose rights were protected in this case has now been in the care of foster parents for almost five years. They are virtually the only parents he has known and yet he remains in a legal limbo while the slow and arduous appellate process continues its tedious course. Recognizing that it would be a cruel thing indeed to allow him to be adopted so long as there exists any possibility whatsoever of a reversal on appeal which would nullify such an adoption, the Jefferson County Department of Social Services has retained legal custody of him. No one disputes that it is a hard thing to lose a child, but the Appellant was afforded all that due process requires in an action which involved not only her rights but the best interests of her son and the rights of the state. The Supreme Court of Colorado was correct, "Our legal system sometimes requires courts to draw lines." This child is entitled to at least the promise of a stable future and this court should not permit his fate to hang in the balance while the Appellant and her attorneys pursue their "test case" crusade tilting at the windmills of statutory perfection. It is time this matter was ended.

CONCLUSION

For the foregoing reasons this appeal should be dismissed or, alternatively, the decision of the Supreme Court of Colorado should be affirmed. Likewise, the Appellant's alternative request for consideration of this cause via certiorari (Jurisdictional Statment, p. 3) should be denied as well.

It is so moved.

Respectfully submitted,

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